

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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OCT 12 1984

PITTSBURGH AND MIDWAY : CONTEST PROCEEDING
MINING CORPORATION :
Contestant : Docket No: WEST 82.-131-R(A)
: Citation No: 1016965
: v. : Edna Mine
: SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), :

DECISION

Appearances: John A. **Bachman**, Esq., The Gulf Corporation,
Law Department, Denver, CO, for Contestant
James H. Barkley, Esq., Office of the
Solicitor, U.S. Department of Labor,
Denver, CO, for Respondent

Before: Judge Moore

During the course of an inspection of applicant's strip mine on February 23, 1982, Inspector Horbatko was approached by a drill operator and informed that a "slump" had occurred. The drill operator expressed some concern for his own safety.

Inspector Horbatko then went to the area of the spoil bank that the driller had indicated and observed conditions that indicated to him that a "slump" had occurred. A "slump" which was called by several other names during the course of the hearing, is a movement in the spoil bank which results in some of the material composing the spoil bank sliding down the bank towards the bottom of the pit. The word "slump" is not used to describe a complete spoil bank failure which would be similar to an avalanche.

A trench at the foot of the spoil bank called a catch pit is designed to catch any slumping material and keep it from going into the pit area where the mining is being done. The inspector testified that a slump does not create a hazard unless the sliding material is in such a quantity that it fills the catch basin and then overflows out into the working area. But the evidence that Inspector Horbatko saw together with the concern expressed by the drill operator led him to believe that the slump had overflowed the catch pit. He considered the slump a hazardous condition and re-examined the company's books and found no notation that a slump had occurred.

After some discussion with loading foreman Isenbager, the inspector issued a citation charging a violation of 30 CFR 77.1713(c). That section provides as follows:

After each examination conducted in accordance with the provisions of paragraph (a) of this section, each certified person who conducted all or any part of the examination required shall enter with ink or indelible pencil in a book approved by the Secretary the date and a report of the condition of the mine or any area of the mine which he has inspected together with a report of the nature and location of any hazardous condition found to be present at the mine. The book in which such entries are made shall be kept in an area at the mine designated by the operator to minimize the danger of destruction by fire or other hazard.

Foreman Isenbager testified that the slump had in fact occurred and that it was of sufficient magnitude to overflow the catch pit and spill out **on to** the floor of the mine. The slump did not occur on February 22 as Inspector Horbatko had assumed, but on February 21 after the end of the shift. He testified that during the winter months, because of the thawing and the freezing, almost all slumps occur around **5:30 P.M.** and after the dragline has advanced one set past the area in question 1/. Mr. Isenbager noticed the slump on his pre-shift **examination** on the morning of February 22 and had it cleaned up before any other work was done. The slump could have possibly occurred during the early morning of February 22, but because of the history of 'slumps at this mine during the wintertime, the great probability is that it occurred on the previous day. In any event, it occurred after one shift ended and before the next shift began. No one would have been in the pit at the time of the slump.

Mr. Isenbager testified that if there had been miners working in the pit at the time of the slump he would have recorded it as a hazard because of the possibility of injury to a miner who might be working near the spoil bank. Inasmuch as the slump had already occurred during non-working hours however, he could not see that it was a hazardous condition that had to be recorded.

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After a dragline has removed as much overburden as it can from one location, it is moved to a new location further down the pit so that it can remove overburden from the area where it had previously been stationed. The distance from one **location to** another is called a set.

During the Course of the testimony reference **was made** to exhibits that had been received in evidence in Dockets **No: WEST 82-131-R and WEST 82-170** which involved the same parties in the same mine. (**My decision** of June 16, 1983 is reported at 5 **FMSHRC 1146**). Applicant's exhibit 1, is a top view of the pit area where the slump occurred. The station markers - 14 through 20 - are on the **highwall** side of the **pit, but the** slump involved herein Was on the spoil bank across the pit from the area between station 16 **and station 17**. Applicant's exhibit **2 is a** cross-section of a typical **portionof** the pit and it shows the catch pit and how **a typical** slump would fall into the catch pit.

It is obvious that a slump is not some rare and unexpected occurrence 2/ They **occur** often and the catch pit is designed to **contain the** material. When material **overflows** from the catch pit, a hazard could be created if there **were** a miner in the area to be injured. The question **I** have to decide however, is whether a condition which was not hazardous when found and cleaned up must nevertheless-be recorded in the pre-shift examination book. MSHA argues that it needs such information to assist it in-reviewing the ground control plan. It might well be that **MSHA** does need information as to which slumps overflow the catch basin, but in my opinion the regulation involved in this case does not require that it be recorded. The requirement is that the certified person, after making his examination must record in the book "the nature and location of any hazardous condition found to be present at the mine" (emphasis added). I interpret that to mean that **the condition** which must be reported, must be hazardous at the time it is found. Unlike a roof fall, which may create further hazards, a slump removes the instability in the spoil pile and eliminates the hazard. In the instant case the hazard had been eliminated before the pre-shift examination while no one was in the pit area, I find that the regulation in question does not require that a slump which occurred between shifts be recorded in the examination book.

The citation is **VACATED** and the case is **DISMISSED**.

Charles C. Moore, Jr.
Charles C. Moore, Jr.
Administrative Law Judge

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The company's hearsay objections are rejected because not only did Inspector Horbatko corroborate the hearsay by visual inspection of the site, but Mr. Isenbager furnished an eye-witness report of the existence of the report.

Distribution:

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